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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

KONIAG, INC.

Petitioner,

v.

OMAR STRATMAN, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Rule 60(b)(1) of the Federal Rules of Civil Procedure is the exclusive basis for reopening a case when it is alleged that a settlement agreement was entered into under a mutual mistake of fact.

II. Whether a mutual mistake of fact is an "extraordinary circumstance" which entitles a party to relief from a settlement agreement under Rule 60(b)(6) when that party has pursued enforcement of the agreement in state court.

III. Whether a party is entitled to relief from a settlement agreement under Rule 60(b)(6) on the grounds of mutual mistake when the party sought enforcement of the agreement in state court and the state court found that, at the time the agreement was entered, the party seeking rescission had knowledge that the agreement might be unenforceable.

IV. Whether the due process clause of the Fifth Amendment entitles the holder of a federal grazing lease on land subject to selection under ANCSA to actual notice of village eligibility proceedings where the leaseholder's interest constitutes a "valid existing right" which ANCSA expressly preserves.

V. Whether the due process clause of the Fifth Amendment entitles holders of a federal grazing leases on land subject to selection under ANCSA to actual notice of village eligibility proceedings where the regulations promulgated under ANCSA provide for notice and an opportunity to appear at a later stage in the proceedings to protect the integrity of such interests.

VI. Whether the due process clause of the Fifth Amendment entitles a person with only a recreational interest in land subject to selection under ANCSA to actual notice of village eligibility proceedings where the person is a shareholder which previously held an economic interest in the land at issue.

VII. Whether the holder of a recreational interest in land subject to selection under ANCSA is within the "zone of interests" protected by ANCSA, thereby entitling such person standing to assert an injury to that interest.

PARTIES

The plaintiffs in this case when it was before the United States Court of Appeals for the Ninth Circuit in 1981 were Omar Stratman, Toni Burton, John Murray, Michael Devers, James Schauff, and Brian Shafford.[1] Defendants were the then Secretary of the Interior,[2] Anton Larsen Bay, Inc., Bells Flats Natives, Inc.,[3] Leisnoi, Inc., and Koniag, Inc.

As this case was before the Ninth Circuit in 1994, plaintiff was Omar Stratman. Defendants were Bruce Babbitt, Secretary of the Interior, Leisnoi, Inc., and Koniag Inc.

Pursuant to Rule 29.1 of the Rules of the Supreme Court, Koniag, Inc. states that it has no parent corporations, subsidiaries (including wholly-owned subsidiaries/or affiliates) that have issued shares to the public.

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1 When the case was originally filed, the Kodiak-Aleutian Chapter of the Alaska Conservation Society was also a plaintiff. An amended complaint was subsequently filed omitting it as a party.

2 When this case was brought before the Ninth Circuit in 1981, the Secretary of the Interior was James Watt.

3 The district court concluded that because the villages of Anton Larsen Bay and Bells Flats had not been certified by the Secretary as eligible, *see Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *aff'd in part and rev'd in part sub nom. Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978), any litigation over the eligibility of those villages was premature. *See* App. D, p. 26a. Plaintiffs did not seek appellate review of that holding. Neither Bells Flats nor Anton Larsen Bay were involved in the consideration of the case by the Ninth Circuit and they are not discussed further in this petition.

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OPINIONS BELOW

The 1981 opinion of the United States Court of Appeals for the Ninth Circuit, reported as *Stratman v. Watt*, 656 F.2d 1321 (9th Cir. 1981), appears as Appendix A. There were three opinions of the United States District Court for the District of Alaska. The first, rendered *sub nom. Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*, 423 F.Supp. 544

(D. Alaska 1976) appears as Appendix C. The Second, rendered *sub nom. Stratman v. Andrus*, is unreported and appears as Appendix D. The third, also unreported, was entered on remand from the Ninth Circuit,[4] *sub nom. Stratman v. Andrus*, and appears as Appendix F.

The 1994 opinion of the Ninth Circuit is unreported and appears as Appendix B. *Stratman v. Babbitt*, No. 93-36006 (9th Cir. Dec. 5, 1994). There was one opinion from the district court for the district of Alaska. This case is unreported and appears as Appendix G.

JURISDICTION

The first judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 8, 1981. Rehearing was denied on November 27, 1981. The second judgment of the Court of Appeals was entered on December 5, 1994 Rehearing was denied on February 22, 1995. The jurisdiction of this Court is invoked with respect to both judgments pursuant to 28 U.S.C. § 1254(1) (1988).[5]

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[4] The remand was unaccompanied by an opinion. It was issued to enable the district court to grant the federal defendant's motion for relief from judgment under Fed. R. Civ. P. 60(b).

[5] Rule 13 of the Supreme Court Rules requires that a petition be filed within 90 days after the entry of judgment. Although over a decade has passed since the Ninth Circuit's 1981 opinion in *Stratman v. Watt*, this petition is timely. As discussed *infra*, this case was originally settled before the Supreme Court could grant or deny certiorari. The case was subsequently reopened under Fed. R. Civ. P. 60(b)(6). This petition comes within 90 days of the Ninth Circuit's denial of rehearing on that issue.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties...

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

The relevant provisions of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), *codified at* 43 U.S.C. §§ 1601 *et seq.*, are set forth in Appendix M. The relevant provisions of 43 C.F.R. §§ 2650 *et seq*. are set forth in Appendix K.

STATEMENT OF THE CASE

Plaintiffs originally filed this action to enjoin the Secretary of the Interior ("Secretary") from conveying any lands in Alaska to the Native village corporation of Leisnoi, Inc. (village of Woody Island), under the terms of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) *codified at* 43 U.S.C. §§ 1601 *et seq*. ("ANCSA").[6] The district court dismissed

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[6] Unless otherwise indicated, all ANCSA citations are to the 1988 edition of the official reporter. The relevant code sections are substantially identical to the 1976 edition, which was the current edition at the time this case was originally decided.

plaintiffs' claims for lack of jurisdiction and failure to exhaust administrative remedies. The Court of Appeals affirmed in part and reversed and remanded in part. The case was then settled pursuant to an agreement entered into between plaintiffs Stratman and Burton and defendant Koniag, Inc.[7]

More than ten years later, after the Alaska Supreme Court declined to hold Leisnoi[8] bound by the terms of the settlement agreement, Stratman moved pursuant to Fed. R. Civ. P. 60(b)(6) to reopen this litigation. The district court denied Stratman's motion. The Court of Appeals reversed. This petition followed to challenge both the Ninth Circuit's 1981 ruling in *Stratman v. Watt* and the Ninth Circuit's 1994 ruling in *Stratman v. Babbitt*.

ANCSA provides for the distribution of some forty million acres of federal land and $962,500,000 to Alaska Natives as a settlement of all aboriginal land claims. 43 U.S.C. § 1601 (1988); *see Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 604 (D.C. Cir.), *cert denied*, 439 U.S. 1052 (1978). Land benefits are distributed to Alaska Natives through Native villages and regional corporations established pursuant to ANCSA.[9] A village

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7 At the time the parties entered this settlement agreement, Koniag, Inc. was the successor in interest to Leisnoi, Inc. as a result of a merger between the two corporations. This merger is discussed *infra*.

8 At the time Stratman brought this action in state court, Leisnoi had demerged from Koniag. This demerger is discussed *infra*.

9 Each resident of an "eligible" village holds stock in that village corporation and in the regional corporation for that geographic region. 43 U.S.C. §§ 1606, 1607 (1988 & Supp V 1993).

may receive land benefits if the Secretary determines that the village is "eligible" to receive benefits.

The Act lists some villages by name and allows other villages to apply to the Secretary for certification. 43 U.S.C. § 1610 (1988). When an unlisted village applies for certification as an eligible village, the Alaska Area Director of the Bureau of Indian Affairs publishes notice of the application in the *Federal Register* and in one or more Alaska newspapers. 43 C.F.R. § 2651.2(a)(8) (1994).[10] The Area Director then makes a preliminary decision as to eligibility and publishes the decision in like manner. *Id.* Any "interested party" may protest the decision by filing a notice of protest within thirty days. *Id.* at § 2651.2(a)(9) (1994). The Area Director then reviews his preliminary determination. Persons who are "aggrieved" by the Area Director's decision may appeal to the Alaska Native Claims Appeals Board. *Id.* at § 2651.2(a)(10). The board's decision is subject to final approval by the Secretary. *Id.*

If the Secretary determines a village to be eligible, the village may select land from designated portions of federal land. The surface estate of selected land is conveyed to the village, and the subsurface estate is conveyed to the regional corporation. 43 U.S.C. §§ 1611, 1613 (1988). All conveyances are "subject to valid existing rights." *Id.* at § 1613(g).[11]

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10 All citations to the federal regulations are from the 1994 revision unless otherwise indicated. The relevant portions of the 1994 regulations are substantially identical to the 1980 regulations which were in effect when the Ninth Circuit considered this case in 1981.

11 Section 14(g) of the Act states:

> All conveyances made pursuant to this chapter *shall be subject to valid existing rights*. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the

The native village of Woody Island (Leisnoi) applied for certification, and the Area Director published notice of the application. On March 19, 1975, the Secretary approved the certification of eligibility for the Village of Woody Island. 40 Fed. Reg. 12527 (March 19, 1975). On July 2, 1976, this suit was filed in the United States District Court for the District of Alaska to enjoin the Secretary from issuing patents to the Village of Woody Island. Jurisdiction was invoked pursuant to 28 U.S.C. § 1331(1976). Each of the plaintiffs alleged that they used some of the lands in question for recreational purposes. Complaint, ¶ 7. In addition, two of the plaintiffs, Stratman and Burton, alleged harm to property rights. They claimed that they owned federal grazing leases on land[12] which would be conveyed to Leisnoi if the village was certified. *Id.* at ¶ 6. They also alleged claims arising out of their ownership of a slaughterhouse facility on federal land.[13] Amended Complaint, ¶ 7.

> Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Id. (emphasis added).

12 This land had been selected by the State of Alaska and tentatively approved by the United States for patent to the state under the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Complaint, ¶ V.

13 This claim was added later in an amended complaint. The claim was based on land which was earmarked for patent to the State of Alaska under the Alaska Statehood Act. After the State of Alaska made tentative selection of the lands underlying the slaughterhouse, the State released its rights to the Kodiak Island Borough, which in turn quitclaimed the property to the Kodiak Livestock Cooperative. Stratman and Burton were members of the cooperative. Amended Complaint, ¶ VII.

The Secretary moved to dismiss the complaint on the grounds that plaintiffs had failed to exhaust administrative remedies.[14] App. C, p. 21a. The district court held that Stratman and Burton were excused from their failure to exhaust administrative remedies. The court found that notice by publication was insufficient because they held property rights, and their names and addresses were easily ascertainable. App. C, p. 21a - 23a. However, with respect to the plaintiffs who did not assert property rights, the court found that notice by publication was sufficient. Thus, the court held, those plaintiffs holding only recreational interests were not excused for their failure to exhaust administrative remedies and, therefore, not entitled to judicial review. *Id.*

On September 7, 1978, Leisnoi relinquished its interest in the lands subject to Stratman and Burton's grazing leases. Shortly thereafter, Leisnoi quitclaimed to the Kodiak Island Borough all interest in the lands on which the slaughterhouse was located. The non-government defendants then moved to dismiss the complaint on the ground that the relinquishment and quitclaim divested the court of subject matter jurisdiction by eliminating any case or controversy.

The district court held that the relinquishment and quitclaim "remove[d] all dispute between Stratman and Burton over the land selections involving the federal

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14 The Secretary also moved to dismiss on the ground that plaintiffs had failed to join indispensable parties. App. C, p. 20a. The district sustained the Secretary's claim and gave Stratman and Burton opportunity to file and amended complaint. *Id.*

grazing leases and the slaughter-house."[15] App. D, p. 27a. Thus, the court concluded that there was no case or controversy, and Stratman and Burton did not have standing. *Id.* at p. 29a. In a subsequent decision,[16] as an additional grounds for dismissing Stratman and Burton's claims, the district court held that Stratman and Burton had no economic interests to assert because

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15 In addition, the court noted that Stratman and Burton did not appear to be the proper parties in interest because the leases were actually held by corporations. App. D, p. 27a n.1, & n.2 (citing Fed. R. Civ. P. 17(a)).

16 The actual procedural history of the case is complicated. When the district court held that Leisnoi's relinquishment and quitclaim extinguished any case or controversy, Stratman and Burton argued, in the alternative, that a dispute still existed because other land selections by Leisnoi injured their rights in certain state grazing leases. App. D, p. 27a - 28a. The court rejected this contention. The court found that, even if the state leases were relevant, Stratman and Burton could not be injured by the transfer of these lands to Leisnoi because section 14(g) of ANCSA made all transfers subject to valid existing rights. *Id.* at p. 28a-29a.

Plaintiffs appealed the decision. On January 30, 1979, while the appeal was pending before the Ninth Circuit, the federal defendant moved the district court pursuant to Fed. R. Civ. P. 60(b) for relief from judgment. App. J. In that motion, the government asserted that the court's 1976 decision (App. C), holding that Stratman and Burton were entitled to actual notice, was inconsistent with the court's October 16, 1978 decision (App. D), holding that Stratman and Burton could not allege any injury to property because section 14(g) protected all valid existing property interests. App. J. The federal defendant requested a clarification of this apparent conflict. App. J, p. 51a.

The Ninth Circuit remanded the case to the district court for consideration of the federal defendant's Rule 60(b) motion. *See* App. F. The district court agreed that there was a conflict between its 1976 and 1978 memorandum and order. The court noted that in its 1976 memorandum and order, it held that Stratman and Burton were entitled to actual notice of administrative proceedings because they held federal grazing leases on the land at issue. App. F. Therefore, they were not required to exhaust administrative remedies. *Id.* The court vacated this portion of the 1976 memorandum and order which entitled Stratman and Burton to actual notice. *Id.*

any transfers made under ANCSA were subject to "valid existing rights."[17] The court stated:

> This provision means that whatever property interests were held by Stratman and Burton, including the federal grazing leases, could not be injured by Woody Island's eligibility and the selection of land by its village corporation. Any patents issued to the village corporation would have to protect the property interests upon which the court had previously based its decision on exhaustion of administrative remedies.

App. F, p. 34a.

On September 8, 1981, the Ninth Circuit affirmed in part and reversed and remanded in part. App. A. The Ninth Circuit first addressed the issue of standing. The court found that Stratman and Burton did not have standing to assert economic interests because Leisnoi had disclaimed any interest in the lands at issue. However, the court held that they did have standing to assert recreational interests. *Id.* at p. 6a - 7a.

The Ninth Circuit then addressed the issue of notice. The court found that notice by publication was sufficient for those plaintiffs alleging only a recreational interest in the land. *Id.* at p. 8a. However, the court noted that at the time of Woody Island's application for certification, Stratman and Burton held record interests

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17 In a second case brought by Stratman against Leisnoi and Koniag, the district court followed this analysis and held that Stratman did not have standing because section 14(g) of ANCSA protected valid existing rights. *Stratman v. Andrus*, No. 79-116 (D. Alaska January 4, 1980) (order granting motion to dismiss).

in the land at issue. The court further noted that Leisnoi subsequently disclaimed any interest in this land. Nevertheless, the court concluded that Stratman and Burton were entitled to actual notice because the disclaimer did not occur until after the conclusion of the administrative proceedings. *See Id.* at p. 8a - 10a.[18] The court rejected defendants' argument that section 14(g) of ANCSA protected valid existing property rights. *Id.* at p. 9a n.4. Therefore, the Ninth Circuit remanded the case to the district court to determine whether Stratman and Burton were barred by exhaustion of remedies.[19] *Id.* at p. 11a.

Defendants petitioned this Court for certiorari to address the issues of standing and exhaustion of administrative remedies.[20] In 1982, before certiorari could be taken or declined by this Court, Stratman and defendant Koniag agreed to a settlement whereby, Stratman would dismiss this case if Koniag would quitclaim its interest in the land underlying the grazing lease.

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18 The court reasoned that Stratman and Burton would have been able to air their recreational grievances as well as their economic grievances at an administrative hearing. *Id.*

19 The ultimate conclusion of the Ninth Circuit regarding exhaustion of remedies is not completely clear. On one hand, the court concluded that Stratman and Burton should be entitled to actual notice. On the other hand, the court remanded to consider the exhaustion issue. In any case, for purposes of certiorari, Koniag affirmatively argues that Stratman was not entitled to actual notice and therefore not excused for his failure to exhaust administrative remedies. *See* discussion *infra*. Thus, a remand to consider the issue of exhaustion is unnecessary.

20 That petition was filed as No. 81-1564, for the October term, 1981.

At the time Stratman and Koniag entered this agreement, Leisnoi had merged with Koniag. However, this merger was later declared void ab initio,[21] and the surface estate in the land underlying the grazing was conveyed to Leisnoi. Leisnoi declined to convey the land to Stratman on the grounds that it was not a party to the agreement.[22] In late 1985, Stratman instituted an action in state court against Leisnoi seeking specific performance of the 1982 agreement or, in the alternative, damages against Koniag. *See Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992). Stratman prevailed before the trial court. However, the Alaska Supreme Court reversed the trial court ruling and ultimately held that there was no enforceable contract between Stratman and Leisnoi. *Id.* at 1210-11.[23]

Stratman then moved the district court to reopen this case pursuant to Rule 60(b)(6). The district court denied Stratman's request. The Court of Appeals reversed the district court's decision on the ground that rescission of the settlement agreement was appropriate because of a mutual mistake of fact.

REASONS FOR GRANTING THE WRIT

I. In reaching this conclusion to rescind the settlement agreement, the Court of Appeals incorrectly

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21 This demerger resulted from a separate litigation challenging the merger of Koniag and Leisnoi.

22 Koniag did convey its interest in the subsurface estate to Stratman pursuant to the 1982 agreement.

23 Between the trial court and supreme court decisions, Stratman and Koniag again settled "all actions between or which could be between Omar Stratman and Koniag, Inc."

granted relief under Rule 60(b)(6) because the exclusive remedy for a settlement agreement mistakenly entered into is found in Rule 60(b)(1).[24]

Rule 60(b)(6) is a catchall exception which authorizes a court to grant relief from a final order for "any other reason justifying relief..." Fed. R. Civ. P. 60(b)(6). This Court has stated that relief under Rule 60(b)(6) is only available to parties in "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 198-200, 71 S. Ct. 209, 211-13, 95 L. Ed. 207 (1950). Relief is not available from harm suffered as a result of free, calculated, deliberate choices. *Id.*

The Court of Appeals found that the parties entered the settlement agreement as a result of a mutual mistake of fact. App. B. The court further found that Stratman did not bear the risk of that mistake. *Id.* Thus, the court concluded that the settlement agreement was unenforceable and granted relief under Rule 60(b)(6) as an extraordinary circumstance. *Id.* This ruling conflicts with the exclusive provision for relief from mistake found in Rule 60(b)(1).

This Court should grant certiorari in its supervisory capacity over the courts of appeals to determine the construction of Rule 60(b)(6) with Rule 60(b)(1). Rule 60(b)(1) allows relief from judgments based upon "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). It is generally held that no relief is available under Rule 60(b)(6) if relief would be available under Rules 60(b)(1)-(5). *United States v. 119.67 Acres of Land*, 663 F.2d

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24 Of course, a party may also pursue an appropriate remedy in state court.

1328, 1331 (5th Cir. 1981). If a settlement agreement were mistakenly entered into relief could be sought under Rule 60(b)(1) and therefore not under 60(b)(6). *See 119.67 Acres of Land*, 663 F.2d at 1331. Although some courts have allowed relief under 60(b)(6) when a settlement agreement was totally unauthorized, *Id.*; *United States v. 32.40 Acres of Land*, 614. F.2d 108, 133-14 (6th Cir. 1980), or on the theory of changed circumstances, *see Stotts v. Memphis Fire Department*, 679 F.2d 541, 562 (6th Cir. 1982); *see also Equal Employment Opportunity Commission v. Safeway Stores, Inc.*, 611 F.2d 795, 800 (10th Cir. 1979),[25] an expansive application of these cases to settlement agreements based on a mutual mistake would erode the exclusivity of Rule 60(b)(1). Therefore, the Ninth Circuit erred by granting relief under Rule 60(b)(6) on the basis of a mutual mistake of fact.

Alternatively, even if a court may grant relief under Rule 60(b)(6) from a settlement agreement into which the parties mistakenly entered, a mutual mistake does not in itself constitute an extraordinary circumstance. A court must consider other facts and circumstances to determine whether a mutual mistake constitutes an extraordinary circumstance. Thus, for example, a court should consider the merits of the case and the potential for relief if the case were reopened. *See Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 605-06 (5th Cir. 1986) (considering potential relief available under Rule 60(b)(6)). The Ninth Circuit erred

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25 *But see Duran v. Elrod*, 713 F.2d 292, 296-97 (7th Cir. 1983) (noting that parties to a dispute made free, deliberate choice to settle dispute and bargained at arms length).

because it did not consider such facts or circumstances when granting relief to Stratman under Rule 60(b)(6).[26]

II. The Court of Appeals incorrectly granted relief under Rule 60(b)(6) because Stratman's inability to secure a favorable disposition in state court to enforce the settlement agreement is insufficient grounds to grant relief.

This Court should grant certiorari to resolve a conflict in the courts of appeals. In *Stipelcovich v. Sand Dollar Marine, Inc.*,[27] the Fifth Circuit held that a party is not entitled to relief from a settlement agreement under Rule 60(b)(6) when that party previously brought an action to enforce the settlement agreement. 805 F.2d 599, 605 (5th Cir. 1986). In *Stipelcovich*, the plaintiff sought to enforce a settlement agreement and obtained a judgment against the defendant. However, the defendant was insolvent, and the plaintiff was unable to collect. The plaintiff then brought a motion to reinstate the case. *Id.* at 602-03.

On appeal, the Fifth Circuit found that the plaintiff was not entitled to relief from judgment under Rule 60(b)(6). The court reasoned that when the defendant breached the settlement agreement, the plaintiff had two choices. Either she could bring an action to enforce the agreement, or she could make a Rule 60(b)(6) motion for relief from judgment. The court concluded that since she chose to seek enforcement of

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26 Stratman challenges Leisnoi's certification. If Leisnoi were, in fact, decertified as a result of this litigation, it is not clear what relief, if any, Stratman would be entitled to as a recreational interest holder.

27 This case is argued in Koniag's Petition for Reconsideration, January 17, 1995, at p. 11 n.1.

the settlement agreement, she was now precluded from seeking a reinstatement under Rule 60(b)(6). *Id.* at 605.

The Fifth Circuit's opinion conflicts with the Fourth Circuit's opinion in *Vincent v. Reynolds Memorial Hospital, Inc.*, 728 F.2d 250 (4th Cir. 1984). In that case, the plaintiff brought suit in state court seeking to enforce a settlement agreement with the defendant. *Id.* at 251. The state court held the agreement void as a matter of public policy. *Id.* The plaintiff then moved in the federal district court for relief from judgment under Rule 60(b)(6). *Id.* On appeal, the fourth circuit held that the invalidity of the settlement agreement entitled the plaintiff to relief. *Id.*[28]

Likewise, the Ninth Circuit's opinion in the present case conflicts with *Stipelcovich*. This Court should grant certiorari to resolve this conflict. In any case, this Court should adopt the principle which the Fifth Circuit followed in *Stipelcovich* that when a party pursues enforcement of a settlement agreement and receives an unfavorable disposition, this does not in itself constitute an "extraordinary circumstance" warranting relief from judgment under Rule 60(b)(6).

III. In *Leisnoi v. Stratman*, 835 P.2d 1202 (Alaska 1992), the Alaska Supreme Court found that

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28 The Fourth Circuit's opinion in *Vincent* is arguably distinguishable from the Fifth Circuit's opinion in *Stipelcovich*. In *Vincent*, the state court found that the settlement agreement was invalid. *Id.* In contrast, in *Stipelcovich*, the plaintiff obtained a valid judgment on the settlement agreement. In any case, it is unclear how these cases should be applied to the instant case. In Stratman's state court action to enforce the settlement agreement, the Alaska Supreme Court did not hold that the settlement agreement was invalid. It merely held that under the doctrine of *lis pendens* the agreement was not binding on Leisnoi. *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1208-11 (Alaska 1992).

Stratman and Burton had knowledge that the settlement agreement might be unenforceable against Leisnoi. In light of this finding, the Court of Appeals incorrectly granted relief under Rule 60(b)(6).

The doctrines of *res judicata* and collateral estoppel are firmly ingrained in American jurisprudence. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979). By virtue of the Full Faith and Credit clause of the United States Constitution and 28 U.S.C. § 1738, federal courts are required to give *res judicata* effect to the judgments of state courts. *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985); *see also Hoffman Construction Co. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 799 (9th Cir. 1992), *cert. denied* 113 S.Ct. 1258 (1993); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321-22 (9th Cir. 1988); *Hirst v. California*, 770 F.2d 776, 777-78 (9th Cir. 1985). They must apply the *res judicata* rules of a particular state to the judgments issued by that state. 28 U.S.C. § 1738; *Hoffman*, 969 F.2d at 799; *Robi*, 838 F.2d at 322.

In the instant case, the court of appeals held that its decision was not foreclosed by issue preclusion because the Alaska Supreme Court did not consider whether the settlement agreement was invalid. In so concluding, the court mischaracterized the term "issue." The doctrine of issue preclusion applies to both issues of fact and issues of law that were previously litigated in state court. *Americana Fabrics, Inc.*, 754 F.2d at 1529; *American Mannex Corp. v. Rozands*, 462 F.2d 688 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972). The Alaska Supreme Court held:

> The trial court specifically found that Stratman and Burton were aware that a potential result of the Shurvaloff litigation was demerger and

> restoration of Leisnoi's rights to land. They are bound by that result.

Leisnoi, 835 P.2d at 1211. The Court of Appeals completely disregarded this finding of fact by the state court. Thus, the Court of Appeals failed to give full faith and credit to the Alaska Supreme Court's opinion in *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992) and improperly granted relief under Rule 60(b)(6).

Furthermore, Rule 60(b)(6) should not be construed to allow a party to collaterally attack a state court ruling on a settlement agreement. In the instant case, the Court of Appeals disregarded the state court's essential holding. The state court held that a person who acquires an interest in property that is subject to litigation is bound by the judgment in such litigation, at least where the person has notice of the litigation. *Id.* at 1209. It further held that a party is bound by the result of the litigation even if the result is unlikely. *Id.* at 1210-11. Thus, the court concluded that Stratman and Burton were bound by the demerger litigation and could not enforce the settlement agreement against Leisnoi. *Id.* at 1210. The Court of Appeal's decision to rescind the settlement agreement relieves Stratman and Burton of the state court's ruling that they were bound by the demerger litigation. To allow Stratman and Burton to collaterally attack the state court's ruling exceeds the purpose of Rule 60(b)(6) as an extraordinary remedy and conflicts with the principles of full faith and credit.

IV. In the Court of Appeal's 1981 ruling, the court erroneously held that Stratman and Burton were entitled to actual notice. The due process clause of the Fifth Amendment does not require that actual notice of village eligibility proceedings be given to federal leaseholders on land subject to selection under ANCSA

where all such leaseholds constitute valid existing rights which are statutorily protected regardless of the outcome of the proceedings.

The due process clause imposes an obligation on the federal government to provide certain procedural protection prior to depriving any person of life, liberty, or property. That protection is generally said to consist of notice and a hearing appropriate to the nature of the case. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The district court expressly held that section 14(g) of ANCSA eliminated any potential injury to Stratman and Burton's property interests. App. F, p. 34a. Therefore, Stratman and Burton were not deprived of a property interest for due process purposes. Nevertheless, the Court of Appeals concluded that Stratman and Burton were entitled to actual notice. In so doing, the Court of Appeals bypassed the critical threshold issue of whether the due process clause was implicated at all. It thereby substantially expanded the scope of the due process clause.

In the *Mullane* line of cases, this Court has considered the adequacy of various forms of notice with regard to specific governmental actions. *See Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 587 (9th Cir. 1990) (discussing *Mullane* and its progeny). For example, in *Schroeder v. City of New York*, the City of New York attempted to condemn real property of an absentee owner after providing notice by publication. 371 U.S. 208, 208-11 (1962). This Court held that *Mullane* required the city to provide personal notice. *Id.* at 213. In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L Ed. 2d 180 (1983), this Court articulated somewhat

of a bright line rule regarding the sufficiency of notice by publication. This Court stated:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

462 U.S. at 800. Similarly, in *Tulsa Collection Services v. Pope*, this Court held that a creditor of a decedent's estate was entitled to actual notice of probate proceedings because such proceedings could extinguish a creditor's claim. 485 U.S. 478, 578-79 (1988).[29] However, these cases did not address the issue of what constitutes a deprivation of property implicating the due process clause. *See Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610, 614 (5th Cir. 1991); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 587 & n.2 (9th Cir. 1990). This Court should now address that issue.

Several circuit courts of appeal have spoken to the issue. For example, in *Fusco v. State of Connecticut*, the Second Circuit addressed the issue of whether a governmental action causing a decline in property values was a "deprivation" of property implicating the due process clause. 815 F.2d 201 (2nd Cir. 1987). In *Fusco*,

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29 The Court also briefly commented on the issue of what constitutes a deprivation of property rights. The Court noted that "[i]t is not necessary for a proceeding to directly adjudicate the merits of a claim in order to 'adversely affect' that interest." *Id.* at 577. However, like *Mennonite*, this case involved a clear deprivation of a property interest. *See id.; see also Covello Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 587 n.2 (9th Cir. 1990).

landowners brought a civil rights action under 42 U.S.C. § 1983, asserting that certain zoning regulations had deprived them of property without due process of law. *Id.* at 204. On appeal, the Second Circuit suggested a three part analysis to determine whether the zoning regulations had violated the landowners due process rights. *Id.* at 205. The court inquired:

> (a) whether a property right has been identified; (b) whether governmental action with respect to that property rights amounts to a deprivation; and (c) whether the deprivation, if one be found was visited upon the plaintiff without due process of law.

Id. (citing *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981)). Following this analysis, the court held that a decline in property values was not a deprivation of property for due process purposes. *Id.* at 206.

The Eleventh Circuit recently adopted a similar analysis in *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995). In *Zipperer*, a mortgagee challenged the lien prioritization of special assessments leveled by the city on mortgaged land. *Id.* at 622. The mortgagee asserted that the special assessments and their lien prioritization impaired the value of his property interest without providing notice and a hearing and thereby violated his due process rights. *Id.* On appeal, the eleventh circuit followed a three part analysis:

> (1) whether [the mortgagee] had a constitutionally protected property interest; (2) whether he was deprived of that interest; and (3) if he was deprived of a constitutionally protected property interest, whether the [government] failed to use

> constitutionally sufficient procedures before that deprivation occurred.

Id. at 623 (citing *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982)). The court held that the imposition and prioritization of special assessment liens on the mortgaged land did not deprive the mortgagee of his property interest. *Id.* at 625. The court distinguished the Supreme Court's decision in *Mennonite*. *Id.* at 624. The court reasoned that the special assessment liens did not "immediately and drastically diminish [the mortgagee's] interests in a manner that would implicate a *Mennonite* due process deprivation." *Id.* (citing *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991)).

The Fifth Circuit also distinguished *Mennonite* in a case involving facts similar to *Zipperer*. *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d (5th Cir. 1991). The court reasoned:

> Although *Mennonite* espoused a far-reaching requirement of notice to property owners adversely affected by state actions, the case did not analyze, beyond its straightforward facts, what constitutes a "deprivation" of property.

Id. at 614. The court concluded that a deprivation of property did not occur. *Id.* at 616.

In *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581 (9th Cir. 1990), the Ninth Circuit discussed notice requirements in the context of the Federal Energy Regulatory Commission's (FERC's) decision to relicense a hydroelectric power plant. The Covelo Indian Community contended that it

was entitled to actual notice of the FERC proceedings because its statutory fishing rights could be affected by the relicensing of the plant. *See id.* at 587. The Community contended that under the *Mullane* line of cases, notice by publication is insufficient "when the names and addresses of interested parties are reasonably ascertainable." *Id.* The Ninth Circuit recognized that the Community had a property right for purposes of due process analysis. *Id.* Nevertheless, the court concluded that the Community was not entitled to actual notice because any adverse affect on the Community's property interest was speculative. *Id.* at 587-88. The court reasoned that the *Mullane* line of cases did not apply because those cases involved "imminent government action directly affecting parties' property rights." *Id.* at 587.

The Ninth Circuit came to a similar conclusion in *Conner v. Burford* 836 F.2d 1521 (9th Cir. 1988) and 848 F.2d 1441 (9th Cir. 1988). In that case, holders of federal leases challenged an injunction prohibiting the federal government from allowing any activity to occur on any of the leases until they had complied with NEPA and ESA. 836 F.2d at 1541. The lessees asserted that they were denied Fifth Amendment due process because they were not given notice and an opportunity to be heard. *Id.* at 1541 n.51. The court held that "[b]ecause the lessees' property interests were not adjudicated in this litigation, their right to notice and an opportunity to be heard cannot be invoked." *Id.* (citing *Sierra Club v. Watt*).[30] The court noted that although the development

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30 In *Sierra Club v. Watt*, 608 F. Supp. 305 (D.C. Cal. 1985), the district court discussed the due process requirement of notice in the context of the Federal Land Policy Management Act (FLPMA). In that case, the plaintiffs brought a suit challenging an order by then Secretary of the Interior Watt under FLPMA. *Id.* at 313. Mountain States Legal Foundation (MSLF) moved to intervene on behalf of owners of mineral interests on lands affected by the litigation. *Id.* at 318. MSLF contended

of the leases could be delayed by the injunction, the effect on the leases was minimal. *See id.* at 1542.

Thus, the Ninth Circuit's decision in *Stratman* is in conflict with these other opinions from the courts of appeals, including those of the Ninth Circuit. The Supreme Court should grant certiorari to determine how the *Mullane* line of cases applies to cases where there is no clear deprivation of property. As Chief Justice Rehnquist suggested in *Tulsa Collection Service v. Pope*, the inquiry should focus on the effect of the government action on the property right in question. 485 U.S. 478, 494 (1988) (Rehnquist, C.J., dissenting). The Supreme Court should also articulate a standard for determining whether a deprivation of property has occurred. As the preceding cases indicate, the issue has a broad affect on land management and regulation by states, municipalities, and the federal government.

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that due process entitled mineral interest holders notice and an opportunity to intervene. *Id.* at 325.

The district court rejected MSLF's contentions. The court recognized that the mineral interest owners held "property rights which, if threatened, would trigger Fifth Amendment due process protection." *Id.* at 325. However, the court noted that FLPMA provided that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* at 327 (quoting 43 U.S.C. § 1701 n. (h)). The court therefore concluded that the mineral interest owners could not suffer a deprivation of rights implicating the due process clause. *Id.* The court summarized its reasoning:

Put another way, either the interest is a valid existing right protected by the property provision of the due process clause and unaffected by this litigation or it is not, and thus is not subject to due process protection.

Id. This was essentially the same argument made by the federal defendant in its Memorandum in Support of Motion for Relief from Judgment of January 30, 1979. App. J, pp. 33a-34a. Oddly, however, the court distinguished *Stratman v. Watt* in a footnote. 608 F. Supp. at 327 n.39.

V. Stratman and Burton were not entitled to actual notice of the village eligibility proceedings because the regulations provide holders of property interests actual notice and an opportunity to appear at a meaningful time to protect their property rights.

The Court of Appeals purported to address the issue in a footnote. The opinion reads:

> Defendants argue that because the statute provides that the allotment of land to the Native village shall be subject to any valid existing rights, 43 U.S.C. § 1613(g), there need be no notice. We disagree, for those with leasehold interests should receive notice in order to protect the rights intended to be preserved by the statute.

App. A, p. 9a n.4. The Court of Appeals failed to recognized that actual notice is required for persons claiming property interests at the stage of the administrative proceedings in which those rights may be implicated.

Under ANCSA, the settlement process consists of a number of discrete steps. First, the Secretary must determine that the village is eligible for benefits. 43 U.S.C. § 1610(b) (1988). A village is eligible if it meets certain specified criteria. *Id.* Notice of village eligibility proceedings is provided by publication.[31] 43 C.F.R. § 2651.2(a)(2), (8) (1994). Interested parties may participate in these proceedings.

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31 In addition, notice is mailed to all villages within the region and all regions in the state of Alaska. 43 C.F.R. § 2651.2(a)(2), (8).

Second, if the Secretary determines that a village is eligible, and an appropriate village corporation is formed, then the Secretary then reviews the village's land selections to determine their conformity with the statutory limitations. 43 U.S.C. §§ 1611(a) and 1621(l) (1988); *see* 43 C.F.R. § 2651.4 (1994). A decision to convey is prepared which specifies the valid existing rights which are of record either on federal or state land records. The regulations require that "in order to give actual notice [of the decision, it must] be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision." 43 C.F.R. § 2650.7(d). This regulation was promulgated in order to:

> provide notice to any adverse claimant...giving him an opportunity to come forward and assert a claim, thus providing more certainty of title to be conveyed and providing due process for all affected persons.

41 Fed. Reg. 14735 (Apr. 7, 1976). Because Stratman and Burton were entitled to actual notice at such time as the federal act which could affect their property rights would occur, they were not deprived of due process by virtue of the fact that they did not receive actual notice of the decision on Leisnoi's eligibility.[32]

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32 The Ninth Circuit's opinion in *Stratman* may also affect the management of public lands under statutes such as the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-578, 90 Stat. 2744 (1976). Under FLPMA, the Secretary of the Interior is required to devise and maintain land use plans which provide for the use of public lands. 43 U.S.C. § 1712(a) (1988). Federal regulations provide for public notice and an opportunity for participation at several stages of the planning process. 43 C.F.R. § 1610.2 (1994).

Upon starting the preparation of a land use plan, the Secretary is required to publish notice in the Federal Register and appropriate media. *Id.* at § 1601.2(c). In addition, the Secretary is required to maintain a list of persons known to be interested in or affected by a land use plan. *Id.* at §

VI. Stratman and Burton do not have a right to actual notice based on potential economic injury because (1) Stratman and Burton's economic claims were dismissed by the district court, and (2) Stratman and Burton have never been the real parties in interest to assert such injury.

The Court of Appeals agreed with the district court's conclusion that the recreational users were barred from bringing suit because of their failure to exhaust administrative remedies. App. A, p. 5a. Nevertheless, the Court of Appeals found that there was a strong argument for allowing Stratman and Burton to proceed on the basis of their recreational interests because they held economic interests at time of the administrative proceedings. App. A, p. 8a. The Supreme Court has never addressed the issue of whether a person may invoke due process protection with regard to claims which have been dismissed. However, the court of appeal's decision in *Stratman* would appear to conflict with the purpose of the due process clause to protect against deprivations of property. If a court determines that a deprivation of certain interests will not occur, then due process issues become moot with respect to those interests.

Furthermore, the Court of Appeal's conclusion ignores the district court's finding that the grazing leases which gave rise to Stratman and Burton's alleged economic injury were held by Northland Ranches, Inc., and Kodiak Cattle Co.[33] App. D, p. 27a, n.1. Stratman

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1610.2(d). The Secretary must notify those persons of public participation activities. *Id.*

33 The district court noted that the complaint appeared to be in violation of Fed. R. Civ. P. 17(a). App. D, p. 27a n.1.

and Burton were minority shareholders in these corporations. The slaughterhouse was owned by the Kodiak Livestock Cooperative, of which Stratman and Burton were members. Amended Complaint, ¶ VII. The Court of Appeals committed error by allowing Stratman and Burton to bootstrap their recreational claims to the economic claims of the corporations in which they were shareholders. There is no basis in law for allowing Stratman and Burton to invoke the due process rights of these corporations.

VII. Stratman and Burton do not have standing because their recreational interests are not within the zone of interests protected by ANCSA.

The Court of Appeals held that the recreational interests asserted by Stratman and Burton were within the zone of interests protected by the statute. App. A, p. 7a. The court reasoned:

> The regulations do not restrict the nature of protests which may be filed but rather provide that "any interested party" may protest the village certification. 43 C.F.R. § 2651.2(a)(9). The Act itself indicates that Congress was well aware of the recreational interests of users of public land, and specifically provided for retention of public access easements in the lands selected by Native villages in order to preserve and protect recreational interests in the remaining federal lands. 43 U.S.C. § 1616(b).

Id. The court's analysis is erroneous in two fundamental respects. First, the court assumed that administrative standing necessarily confers judicial standing. However,

the fact that a person is a party to an administrative proceeding does not mean that the person should be allowed to seek judicial review. The person must still satisfy judicial standing requirements. *Chemehuevi Tribe of Indians v. Federal Power Commission*, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973); *City of St. Louis v. Department of Transportation*, 936 F.2d 1528, 1532-33 (8th Cir. 1991); *see California Association of the Physically Handicapped v. Federal Communications Commission*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985). Thus, a plaintiff must establish that the injury complained of falls within the "zone of interests" protected by the statute. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-83, 111 L. Ed. 2d 695, 712-13, 110 S. Ct. 3177 (1990). The fact that regulations conferring administrative standing are unrestrictive does not relieve a plaintiff of this burden.

Second, the court misconstrued the purpose of ANCSA. The court reasoned that Congress' awareness of recreational interests was sufficient to confer standing on all holders of recreational interests which could be affected by ANCSA. This exceeds the purpose of ANCSA. The purpose of ANCSA is to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska." 43 U.S.C. § 1601(a) (1988). The Act further provides that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property..." *Id.* at § 1601(b).[34] Thus, ANCSA stands in stark contrast to

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34 *See also* Letter from Secretary of the Interior, Rogers C.B. Morton to the House of Representatives, *reprinted in* U.S. Code Cong. & Admin. News 2216 (1971) (stating that "In the final analysis, legislation on this subject represents an agreement among three parties--the Alaska natives, the State of Alaska and the United States Government.")

other land management and environmental acts which are enacted by Congress for the specific purpose of protecting and conserving natural resources. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 679 (1973) ("The main thrust of SCRAP's complaint was that the Commission's decisions...failed to include a detailed environmental impact statement as required by...the National Environmental Policy Act of 1969"); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 886, 111 L. Ed. 2d 695, 715, 110 S. Ct. 3177 (1990) (finding that "'recreational use and aesthetic enjoyment' are among the *sorts* of interests [FLPMA and NEPA] were specifically designed to protect"); *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988) (environmental case brought under NEPA); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 60-61 (2nd Cir. 1985) (environmental suit brought under Federal Water Pollution Control Act); *United States v. Metropolitan St. Louis Sewer District*, 883 F.2d 54 (8th Cir. 1989) (environmental suit brought under Federal Water Pollution Control Act).

The Court of Appeals correctly noted that Congress did make some accommodation for recreational interests. Under former section 1616(b), the Joint Federal State Land use Planning Commission for Alaska[35] was authorized to identify public easements across selected lands for recreational and other purposes. Pub. L. No. 92-203, § 17(b), 85 Stat. 688 (1971). However, the court severely stretched the prudential limitations of standing by allowing Stratman and Burton to challenge Leisnoi's eligibility by virtue of this legislative accommodation. Although Congress recognized recreational interests under ANCSA, Congress specifically provided other non-judicial

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35 The commission has been abolished. However, the Bureau of Land Management still reserves public easements.

procedures for protecting those interests. For example, the Planning Commission was directed to receive and review statements from interested organizations and individuals when identifying public easements. *Id.* In addition, the regulations provide for public participation in the land selection process. These procedures adequately protect whatever recreational interests may be at stake. Therefore, Stratman and Burton do not fall within the "zone of interests" protected by ANCSA for standing purposes.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in *Stratman v. Watt* and *Stratman v. Babbitt*.

Respectfully submitted,

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